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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/623,489

07/18/2003

Josh Schreider

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EXAMINER

THAKUR, VIREN A

ART UNIT

PAPER NUMBER

1794

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DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/623,489	Applicant(s) SCHREIDER, JOSH	
	Examiner VIREN THAKUR	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 April 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 8-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 8-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

1. **Claim 1 is rejected under 35 U.S.C. 103(a) as being unpatentable over Atwell (US 6561784) in view of Wetzel's Pretzels, Berry (Classic Home Cooking) and in further view of, KrispyKreme, Pretzel Time, Recipe Kitchen, Jindra et al. (US 6528104) and Rooney et al. (US 6242021), for the reasons given in the previous Office Action, mailed December 19, 2007.**

2. **Claims 8-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Atwell (US 6561784), Wetzel's Pretzels, Berry (Classic Home Cooking), KrispyKreme, Pretzel Time, Recipe kitchen and Rooney et al. (US 6242021) as**

**applied to claim 1 above, and in further view of Tepper et al (US 20040126462 A1),
for the reasons given in the previous Office Action, mailed December 19, 2007.**

Double Patenting

3. Claims 1 and 8-9 of this application conflict with claim 1 and 8-9 of Application No. 10642541. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application. Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

4. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

5. Claims 1 and 8-9 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1 and 8-9 of copending Application No. 10642541.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Response to Arguments

6. The rejection of claims 1 and 8-9 under 35 U.S.C. 101, as claiming the same invention as that of claims 1 and 8-9 of copending Application No. 10642541 is maintained since claims 1 and 8-9 are still currently copending.

7. Applicant's arguments filed April 18, 2008 have been fully considered but they are not persuasive.

8. Regarding the Berry reference, the previous Office Action shows the reliance of the Berry reference to teach the particular shape of the dough composition. Applicant's recognition of the use of reference in the rejection is appreciated.

9. On page 3 of the response, Applicant asserts that Atwell does not teach or even suggest filling the holes of doughnuts. Applicant further asserts on page 4 of the response that the statement in the previous Office Action that "Atwell already teaches placing the second dough member within an open space within the first dough..." is incorrect because Atwell does not teach filling the doughnut hole but instead describes a device which partitions a single doughnut such that the doughnut has two or more different types of doughnut dough.

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10. Regarding the positioning of the second dough member within the first dough member, it is noted that by making a doughnut that has two different compositions concentrically arranged would have resulted in the center of the doughnut being occupied by another composition. It is further noted that Applicant has not claimed that the hole must be completely filled, but rather that a second dough member is positioned within a first of the open spaces in the first dough member. Atwell has already been relied on to teach the conventionality of combining a first and second dough composition to make a multiple flavored food product. Atwell teaches using two dough compositions in a concentric formation so that one would inherently have been within the hole of the other. The claims are directed to a product and as such how a prior art product is made cannot measure the patentability of product claims. In any case, it is further noted that Krispy Kreme further supports the teaching of combining a first dough composition with a second dough composition, wherein the second dough composition is placed in an opening of the first composition. Additionally, Rooney et al. further teach the conventionality of a second composition filled within an open space of a first dough composition, as shown in figure 1. Therefore the particular placement of the second dough composition within the first dough composition would have been an obvious matter of choice and/or design since the prior art recognized combining two different dough compositions and further taught the conventionality of positioning a second dough composition within an open space of a first dough composition.

Regarding the particular combination of the different dough compositions, it is noted that the references to Pretzel Time, Recipe Kitchen and Berry teach the

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conventionality of a sweet flavor in combination with a secondary product. The prior art teach doughnuts that are flavored to resemble cinnamon buns (see Krispy Kreme) and also teach pretzels that are coated with cinnamon bun type flavoring (see Recipe Kitchen and Pretzel Time). The pretzel of Recipe Kitchen and Pretzel Time would have had a conventional pretzel flavor, but the coating on the pretzel would have provided a cinnamon bun type flavor. These references all teach the conventionality of combining a sweet composition with a savory composition and further teach the conventionality of providing a cinnamon bun flavor in combination with a pretzel flavor.

Jindra et al. teaches the conventionality in the art of combining a sweet flavor with a savory flavor, such as apple cinnamon with pretzel and Rooney et al. teaches a pretzel stick within the center of cereal pieces, which would also have been a sweet and savory combination. Thus the art provides motivation for combining sweet and savory components.

Wetzel's Pretzels teaches a cinnamon bun flavored pretzel and Atwell teaches the conventionality of taking two different flavored compositions to create a single product. Therefore the art teaches pretzels that have a cinnamon bun composition and a pretzel composition and Atwell teaches combining different dough compositions to achieve a desired flavor. The combination of the prior art further teaches the conventionality of combining two different dough compositions and combining food products to achieve a sweet and savory flavor. To therefore use a particular dough composition, such as cinnamon bun dough would have been obvious since the prior art to Jindra et al. and Rooney et al. teach combining a sweet and savory flavor and since

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Pretzel Time and Recipe Kitchen both teach a pretzel flavor in combination with a cinnamon bun flavor, since Wetzel's Pretzels teaches a cinnamon bun flavored pretzel and since Atwell teach making products comprising bread compositions. (It is noted that Atwell recognized using automated machinery to make pretzels, which can be considered bread compositions). Jindra et al. and Rooney et al. further teach the conventionality of providing a sweet with a savory flavor. Regarding pretzels, Pretzel Time and Recipe Kitchen also teach this concept by having a cinnamon sugar flavor on the pretzel.

How the ordinarily skilled artisan chose to orient the first and second compositions would have been an obvious matter of choice and/or design. Nevertheless, it is noted that KrispyKreme teach filling an open space within a dough based product with another dough composition. Similarly, Tepper also teaches an edible food product comprising multiple openings or the purpose of filling a second food product therein.

Regarding the particular shape of the second dough member, it is noted that Berry was relied on to teach the conventionality of a food product comprised of dough having a spiral configuration. To therefore make the second dough member into a particular shape, such as a spiral would have been an obvious matter of choice and / or design.

11. Further on page 4 of the response Applicant asserts that Atwell merely describes combining different types of doughnut dough, and nowhere is there any mention of combining pretzel dough with any other kind of dough.

It is noted however, that Atwell teaches that the forming of products such as pretzels and doughnuts have been prepared and shaped prior to cooking by the use of machines (column 1, lines 12-20). Atwell further teaches making doughnuts comprising more than one kind of dough. For instance on column 1, lines 45-52, Atwell teaches making a bread or cake product comprising two or more types of dough. Applicant states that Atwell teaches "doughnut dough" but the cited column and line of Atwell, for instance clearly teaches different types of dough used to make a food product. In any case, this teaching by Atwell is relied on to teach combining different compositions for the purpose of creating a unique flavored product. The secondary references have been relied on, as further explained above in paragraph 7, to teach the particular flavor and dough compositions.

12. On page 5 of the response, Applicant states that Wetzel's Pretzels teaches a cinnamon roll that is in the shape of a pretzel, i.e. the composition of a sweet dough product and the configuration of a pretzel. As such, Applicant asserts that a pretzel-shaped product made entirely of sweet dough does not suggest or render obvious a single food product having a savory pretzel and at least one sweet cinnamon bun. Applicant further asserts that these teachings by Wetzel's Pretzels are not pertinent to the claimed invention because the claims make no mention of a sweet cinnamon dough

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product in a shape other than that of a cinnamon bun. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As explained above in paragraph 10, Wetzel's Pretzels teaches a cinnamon bun flavored pretzel and Atwell teaches the conventionality of taking two different flavored compositions to create a single product. Therefore the art teaches pretzels that have a cinnamon bun composition and a pretzel composition and Atwell teaches combining different dough compositions to achieve a desired flavor. The combination of the prior art further teaches the conventionality of combining two different dough compositions and combining food products to achieve a sweet and savory flavor. To therefore use a particular dough composition, such as cinnamon bun dough would have been obvious since the prior art to Jindra et al. and Rooney et al. teach combining a sweet and savory flavor and since Pretzel Time and Recipe Kitchen both teach a pretzel flavor in combination with a cinnamon bun flavor, since Wetzel's Pretzels teaches a cinnamon bun flavored pretzel and since Atwell teach making products comprising bread compositions.

It is further noted that pretzel and cinnamon bun dough compositions can vary greatly. For instance, regarding cinnamon bun dough, it could be expected that the dough of Wetzel's Pretzels is a cinnamon bun dough composition, however, Wetzel's considers this a pretzel. Berry also shows another recipe for cinnamon bun dough. The

point to take is that, the particular dough composition is closely related to the flavor imparted to the dough.

13. On page 6 of the response, Applicant asserts that the claimed invention is a food product that includes both a pretzel dough composition and a cinnamon dough composition. Applicant also alleges that the Office Action has mischaracterized the claimed invention in stating that it would have been obvious to use cinnamon flavored dough with the product of Atwell to achieve the result of the combined flavor of a pretzel with that of a cinnamon roll.”

Firstly, it is noted that the dough compositions directly affect the flavor of the product. Additionally, Atwell teaches using different dough compositions to achieve a desired flavor. The teachings of cinnamon buns, pretzels, cinnamon rolls in the shape of a pretzel, pretzels sprinkled with sugar and cinnamon and the combination of sweet and savory ingredients together, show that cinnamon buns and pretzels have been closely related. The art further teaches combining sweet and savory ingredients and wherein those ingredients can be differing dough compositions. It therefore would have been obvious to use dough such as cinnamon bun dough in combination with pretzel dough since the art teaches combining these flavors and since the art further teaches combining different dough composition.

14. Further on page 6, Applicants assert that “the cited references that describe a pretzel and a cinnamon (not cinnamon bun) combination, there is no language

whatsoever about the inferiority of the pretzel and cinnamon combination or the need or demand for a pretzel and cinnamon combination that exceeds or improves what was commercially available. It is unclear as to what is meant by a cinnamon combination. In any case, the art teaches combining differing flavors into a single product. The art further teaches making a combined product using differing dough compositions and also teaches the particular placement of the dough. Therefore it is noted that the claimed invention would still have been obvious over the combination of the prior art.

15. On page 8 of the response, Applicants assert that the *Tepper et al.* reference is directed to dog bones and as such one would not be motivated to develop a single food product providing both a pretzel and at least one cinnamon bun. In response, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the *Tepper et al.* reference is still directed to edible food products. The claims differ from the previous combination in the particular shape of the second, third and fourth food product and the particular placement of the second, third and fourth food product. Nevertheless, *Tepper et al.* teaches a second, third and fourth food product in a spiral configuration, which has a different composition compared to the food product into which it is placed. Therefore, the reference is being relied on to teach the conventionality of placing spiral shaped food products within a first food product.

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Nevertheless, as stated in the previous Office Action, since the art teaches the conventionality of placing a second dough member having a different composition that that of the first, within an open space of the first dough member, to duplicate the arrangement and place a third and fourth dough member having a spiral configuration into the remaining open spaces would not have provided a patentable feature over the prior art.

Conclusion

16. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VIREN THAKUR whose telephone number is (571)272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/V. T./

Examiner, Art Unit 1794

/KEITH D. HENDRICKS/

Supervisory Patent Examiner, Art Unit 1794